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Classic Maritime Inc v Lion Diversified Holdings Bhd (in liquidation) & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1956–10 OF 2022
AZIZAH NAWAWI, AZIZUL AZMI ADNAN AND MOHD FIRUZ JJCA
7 MARCH 2025

C *Companies and Corporations — Winding up — Liquidators — Application to set aside decision of liquidator to sell equity interests in subsidiary company — Sale of shares of company by public tender after leave of court obtained — Whether applicant could challenge decision of liquidator pursuant to s 517 of Companies Act 2016 — Whether High Court had jurisdiction to revisit court order granting approval of sale — Whether court functus officio — Whether applicant could appeal against decision of court*

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E *Companies and Corporations — Liquidators — Breach of Duties — Sale of shares of company by public tender after leave of court obtained — Whether liquidator failed to take reasonable steps to obtain highest possible price sale of shares — Whether sale prejudicial to interests of creditors — Whether liquidator disclosed pertinent information to winding up court — Whether liquidator acted in best interest of creditors*

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The appellant, a company incorporated in the Marshall Islands was a judgment creditor of the first respondent ('Lion Diversified'). The appellant obtained judgment against Lion Diversified through suits commenced in England arising from breaches of contracts of affreightment. The appellant was owed more than RM440m by Lion Diversified and was its majority creditor. The appellant made an application to the winding up court to set aside the decision of the liquidator of the Lion Diversified to sell its equity interests in a subsidiary, Banting Resources Sdn Bhd ('Banting Resources'), for the price of RM42,220,800. The sale was effected by public tender after leave of court had been obtained. The successful bidder was the second respondent, Benapro Sdn Bhd ('Benapro'). Benapro's bid was the sole bid received in the public tender exercise. The first and second respondents were related to one another by reason of the fact that one Tan Sri William Cheng Heng Jam, a substantial shareholder of Lion Diversified, had substantial interests in Benapro. The appellant had sought to set aside the decision of the liquidator to sell the shares in Banting Resources, on the grounds that: (a) the bid by Benapro was at an undervalue and that accordingly the sale was prejudicial to the interests of the creditors; (b) the liquidator had failed to disclose all pertinent information to the winding up court when the approval of the court was sought for the sale to

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Benapro, pursuant to s 487(3) of the Companies Act 2016 ('the CA'); and (c) the liquidator had not acted in the best interests of the creditors in entering into the sale of the subject shares. The High Court, in dismissing the setting aside application held, inter alia, that: (i) the court was not clothed with the jurisdiction to revisit the order that was had granted on 26 August 2021 approving the sale to Benapro; (ii) the court was functus officio, and that any attempt to set aside its prior order must be made in separate proceedings; (iii) the appellant could not avail itself of s 517 of the CA, as this section did not permit any challenge against an order of court. Aggrieved, the appellant appealed on the grounds that: (A) the liquidator had failed to take reasonable steps to obtain the highest possible price for the Banting Resources shares, and hence the court ought to have set aside the sale; and (B) s 517 applied because the 26 August 2021 order merely constituted an administrative direction to the liquidator.

Held, dismissing the appeal:

(1) There was no suggestion that the liquidator had acted fraudulently or in a manner that was not bona fide. The contention by the appellant was that the liquidator had failed to take reasonable steps to obtain the highest possible price for the Banting Resources shares. However, it would be impermissible for the court to judge the actions of the liquidator with the benefit of hindsight. The evidential burden lay with the appellant to show that the actions by the liquidator was in breach of his duty to the creditors of Lion Diversified. On the facts of the case, the appellant had failed to discharge this burden. Hence there was no error in the findings of the court below (see paras 32 & 36–37).

(2) If bilateral approaches had been made to specific potential bidders, it would call into question the fairness of the tender process. Whatever information disclosed to those bidders must also be disclosed to all other interested bidders, in order to preserve the integrity of the public tender. All these steps would have had their attendant cost and timing implications, and it must not be forgotten that the liquidator was charged with the duty of undertaking the liquidation in a timely and orderly manner in the best interests of the creditors. The balancing of the competing considerations must properly be a matter of the discretion of the liquidator (see para 38).

(3) The appellant's expert report prepared by a corporate finance and investment advisory firm Asia Equity Research Sdn Bhd ('AER') adduced to establish its case that the liquidator had failed to discharge his duties, was of limited utility because: (a) the firm in question was not a licensed real estate valuer, and hence was not competent to provide opinion evidence on the method of valuation employed by PPC International Sdn Bhd ('PPC International'); (b) the appellant's expert misunderstood

the nature of the discount applied by the corporate finance adviser engaged by the liquidator. The discount was to account for the lack of marketability of the Banting Resources shares, and not the lack of marketability of the mining lands held by it; and (c) while the submissions of counsel for the appellant proposed a valuation of RM88,216,799.58 for the Banting Resources shares, the appellant's expert's report itself expressed no opinion on the fair value of the subject shares. There was thus no basis to conclude that the sale to Benapro was at an undervalue and the contention that there had been breaches of duty on the part of the liquidator had not been made out (see paras 10 & 42–43).

(4) The directions sought in the form of summons by the liquidator dated 19 May 2021 were to effect the sale of the Banting Resources shares held by Lion Diversified upon the terms proposed by Benapro. The directions that were given indisputably affected the rights of creditors of Lion Diversified as well as the rights and obligations of Benapro, and did so with conclusiveness and finality. Further, the words of the 26 August 2021 order were peremptory in nature, and not merely in the nature of advice. It was clear that, on their proper construction, the directions contained in the 26 August 2021 order constituted a judgment of the High Court against which an appeal could validly be mounted. It followed, therefore, that the HCJ was entirely correct to rule that he was functus officio once he had granted the 26 August 2021 order. The proper course of action for the appellant ought to have been to appeal against the 26 August 2021 order (see para 50).

(5) The appellant could not avail itself of s 517 of the CA because what was sought to be set aside was not merely an act or decision of the liquidator, but the 26 August 2021 order of the High Court. The proper course would have been for the appellant to appeal against the decision of the High Court (see para 52).

[Bahasa Malaysia summary

Perayu, sebuah syarikat yang diperbadankan di Kepulauan Marshall, merupakan pemiutang penghakiman kepada responden pertama ('Lion Diversified'). Perayu telah memperoleh penghakiman terhadap Lion Diversified melalui tindakan yang dimulakan di England yang berpunca daripada pelanggaran kontrak-kontrak pengangkutan laut. Lion Diversified berhutang terhadap perayu lebih daripada RM440 juta dan merupakan pemiutang majoritinya. Perayu telah memfailkan permohonan kepada mahkamah penggulungan untuk mengenepikan keputusan pelikuidasi Lion Diversified untuk menjual kepentingan ekuiti dalam sebuah anak syarikat, Banting Resources Sdn Bhd ('Banting Resources'), pada harga RM42,220,800. Jualan tersebut telah dilaksanakan melalui tender awam setelah kebenaran mahkamah diperoleh. Pembida yang berjaya adalah

responden kedua, Benapro Sdn Bhd ('Benapro'). Bidaan oleh Benapro merupakan satu-satunya tawaran yang diterima dalam pelaksanaan tender awam tersebut. Responden pertama dan kedua mempunyai kaitan antara satu sama lain disebabkan oleh fakta bahawa seorang yang bernama Tan Sri William Cheng Heng Jam, merupakan pemegang saham utama Lion Diversified, mempunyai kepentingan besar dalam Benapro. Perayu memohon untuk mengenepikan keputusan pelikuidasi berkenaan penjualan saham dalam Banting Resources atas alasan bahawa: (a) tawaran oleh Benapro adalah di bawah nilai sebenar dan oleh itu, jualan tersebut adalah memudaratkan kepentingan pemiutang; (b) pelikuidasi telah gagal mendedahkan semua maklumat yang relevan kepada mahkamah penggulungan ketika memohon kelulusan mahkamah bagi penjualan kepada Benapro, selaras dengan s 487(3) Akta Syarikat 2016 ('AS'); dan (c) Pelikuidasi tidak bertindak demi kepentingan terbaik pemiutang dalam melaksanakan penjualan saham tersebut. Mahkamah Tinggi, dalam menolak permohonan untuk mengetepikan, telah memutuskan antara lain bahawa: (i) mahkamah tidak mempunyai bidang kuasa untuk mengkaji semula perintah yang telah diberikan pada 26 Ogos 2021 berkenaan kelulusan penjualan kepada Benapro; (ii) mahkamah adalah functus officio, dan sebarang percubaan untuk mengetepikan perintah terdahulu perlu dibuat melalui prosiding berasingan; (iii) perayu tidak boleh bergantung kepada s 517 AS, kerana seksyen tersebut tidak membenarkan cabaran terhadap perintah mahkamah. Terkilan, perayu telah merayu atas alasan bahawa: (A) pelikuidasi telah gagal mengambil langkah-langkah yang munasabah untuk mendapatkan harga tertinggi bagi saham Banting Resources, dan oleh itu mahkamah sepatutnya mengetepikan penjualan tersebut; dan (B) s 517 terpakai kerana perintah 26 Ogos 2021 hanyalah merupakan arahan pentadbiran kepada pelikuidasi.

Diputuskan, menolak rayuan:

(1) Tiada sebarang cadangan bahawa pelikuidasi telah bertindak secara penipuan atau tidak bona fide. Pendapat perayu adalah bahawa pelikuidasi telah gagal mengambil langkah munasabah untuk memperoleh harga tertinggi bagi saham Banting Resources. Walau bagaimanapun, ia tidak dibenarkan bagi mahkamah menilai tindakan pelikuidasi dengan manfaat retrospektif. Tanggungjawab pembuktian terletak pada perayu untuk menunjukkan bahawa tindakan pelikuidasi adalah satu pelanggaran tugas kepada pemiutang Lion Diversified. Berdasarkan fakta kes, perayu telah gagal melepaskan beban tersebut. Maka, tiada kesilapan dalam dapatan mahkamah terdahulu (lihat perenggan 32 & 36–37).

(2) Jika pendekatan dua hala dibuat terhadap pembida tertentu, ia akan menimbulkan persoalan mengenai keadilan proses tender. Apa-apa maklumat yang didedahkan kepada pembida tersebut juga mesti didedahkan kepada semua pembida lain yang berminat, demi

memelihara integriti tender awam. Semua langkah ini mempunyai implikasi kos dan masa, dan tidak harus dilupakan bahawa pelikuidasi mempunyai tanggungjawab untuk melaksanakan penggulungan secara teratur dan tepat pada masanya demi kepentingan terbaik pemiutang. Keseimbangan pertimbangan yang bersaing ini seharusnya menjadi budi bicara pelikuidasi (lihat perenggan 38).

(3) Laporan pakar perayu yang disediakan oleh firma penasihat kewangan dan pelaburan korporat, Asia Equity Research Sdn Bhd ('AER') yang dikemukakan untuk menyokong kesnya bahawa pelikuidasi telah gagal menunaikan tugasnya, mempunyai kegunaan terhad kerana: (a) firma tersebut bukan penilai harta berlesen, dan oleh itu tidak layak untuk memberikan keterangan pendapat tentang kaedah penilaian yang digunakan oleh PPC International Sdn Bhd ('PPC International'); (b) pakar perayu telah salah faham berkenaan diskaun yang digunakan oleh penasihat kewangan korporat yang dilantik oleh pelikuidasi. Diskaun itu bertujuan untuk mengambil kira kekurangan kebolehpasaran saham Banting Resources, bukan kekurangan kebolehpasaran tanah lombong miliknya; dan (c) walaupun hujahan peguam perayu mencadangkan penilaian sebanyak RM88,216,799.58 bagi saham Banting Resources, laporan pakar perayu tidak menyatakan apa-apa pandangan mengenai nilai saksama saham tersebut. Maka, tiada asas untuk membuat kesimpulan bahawa penjualan kepada Benapro adalah di bawah nilai, dan hujahan bahawa terdapat pelanggaran tugas oleh pelikuidasi tidak berjaya dibuktikan (lihat perenggan 10 & 42–43).

(4) Arahan yang dipohon melalui saman oleh pelikuidasi bertarikh 19 Mei 2021 adalah untuk melaksanakan penjualan saham Banting Resources milik Lion Diversified berdasarkan syarat-syarat yang dicadangkan oleh Benapro. Arahan yang diberikan secara nyata menjejaskan hak-hak pemiutang Lion Diversified serta hak dan tanggungjawab Benapro, dan dijalankan secara muktamad dan konklusif. Tambahan pula, kata-kata dalam perintah 26 Ogos 2021 adalah bersifat memerintah, dan bukannya sekadar nasihat. Jelas bahawa, berdasarkan tafsiran yang betul, arahan-arahan dalam perintah 26 Ogos 2021 merupakan penghakiman Mahkamah Tinggi, yang boleh dirayu secara sah. Maka, HMT adalah betul apabila memutuskan bahawa beliau adalah functus officio selepas memberikan perintah 26 Ogos 2021. Tindakan yang sewajarnya oleh perayu adalah memfailkan rayuan terhadap perintah 26 Ogos 2021 (lihat perenggan 50).

(5) Perayu tidak boleh bergantung kepada s 517 AS kerana apa yang ingin diketepikan bukan sekadar satu tindakan atau keputusan pelikuidasi, tetapi perintah Mahkamah Tinggi bertarikh 26 Ogos 2021. Tindakan yang betul adalah untuk merayu terhadap keputusan Mahkamah Tinggi tersebut (lihat perenggan 52).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Equiticorp Holdings Ltd (in statutory management) v Mak Kum Choon & Ors and another appeal [2020] 6 MLJ 1; [2019] 5 AMR 817; [2020] 2 MLRA 114, CA (refd)

Koh Huat Kwan v Pegawai Penerima selaku pelikuidasi bagi Poh Mah Housing Development Sdn Bhd & Ors [2015] 5 MLJ 323; [2015] 7 CLJ 16, CA (refd)

MacDonald and another v Carnbroe Estates Ltd (Scotland) [2019] UKSC 57, SC (refd)

Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713; [2012] 2 CLJ 501, FC (refd)

Tan Kim Chuan v Tan Kim Tian & Ors and another appeal [2022] 6 MLJ 888; [2022] 8 AMR 1; [2022] 10 CLJ 503, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 237(3)

Companies Act 2016 ss 472, 484, 487, 487(3), 510, 517, Twelfth Schedule, Part 1

Appeal from: *Classic Maritime Inc v Lion Diversified Holdings Bhd (in liquidation) & Anor* [2022] MLJU 2846 (High Court, Kuala Lumpur)

Yap Yeow Han (with Tan Chuan Yi and Chai Zhe Karn) (Rahmat Lim & Partners) for the appellant.

Goik Kenwayne (with Foong Kar Yee) (Dennis Nik & Wong) for the first respondent.

Sanjay Mohan (with Choon Hon Leng and Rodney Gan) (Sanjay Mohan) for the second respondent.

Azizul Azmi Adnan JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, Classic Maritime Inc, is a company incorporated in the Marshall Islands. It is a judgment creditor of the first respondent, Lion Diversified Holdings Bhd ('Lion Diversified'). The appellant obtained judgment against Lion Diversified through suits commenced in England arising from breaches of contracts of affreightment. Lion Diversified was formerly a publicly listed company. It was delisted and is now in liquidation. The appellant is owed more than RM440m by Lion Diversified, and is its majority creditor.

[2] The appellant made an application to the winding up court to set aside the decision of the liquidator of the Lion Diversified to sell its equity interests

in a subsidiary, Banting Resources Sdn Bhd ('Banting Resources'), for the price of RM42,220,800. The sale was effected by public tender after leave of court had been obtained. The successful bidder was the second respondent, Benapro Sdn Bhd ('Benapro'). Benapro's bid was the sole bid received in the public tender exercise.

[3] It was common ground that the first and second respondents are related to one another by reason of the fact that Tan Sri William Cheng Heng Jam, a substantial shareholder of Lion Diversified, has substantial interests in Benapro.

Before the High Court

[4] The basis upon which the appellant had sought to set aside the decision of the liquidator to sell the shares in Banting Resources is set out in the notice of motion filed before the winding up court: it was contended that the bid by Benapro was at an undervalue and that accordingly the sale was prejudicial to the interests of the creditors. It was also alleged that the liquidator had failed to disclose all pertinent information to the winding up court when the approval of the court was sought for the sale to Benapro, pursuant to s 487(3) of the Companies Act 2016. For these reasons, it was contended that the liquidator had not acted in the best interests of the creditors in entering into the sale of the subject shares.

[5] The High Court dismissed the setting aside application. It did so for the following reasons:

(a) first, the learned High Court judge, Nadzarin J, ruled that he was functus officio, and was not clothed with the jurisdiction to revisit the order that he had granted on 26 August 2021 approving the sale to Benapro, in the absence of any evidence that the order had been irregularly obtained due to illegality, breach of the rules of natural justice or lack of jurisdiction;

(b) second and in any event, the contention that the statement of affairs of Lion Diversified showing its realisable equity value as RM257,987,027.36 had not been brought to the attention of the court when the 26 August 2021 order was sought, was not made out. The statement of affairs was in fact annexed to the affidavit affirmed in support of the application to court;

(c) furthermore, there had been adequate disclosure to the court of the interests of Tan Sri William Cheng in the bidder, Benapro; and

(d) fourth, the High Court ruled that the fact that the sale was effected by public tender established that there had been no undervalue, on the basis that the true commercial value of the shares was the actual price that they

would fetch on the open market, and not the price set out in any valuation report. In addition, it was not open to the appellant to question or challenge the tender procedure adopted by the liquidator in the proper exercise of his discretion.

[6] For these reasons, the High Court concluded that there had not been any breach of duty on the part of the liquidator that warranted curial intervention, even assuming that the *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 principle did not apply.

[7] The High Court made the separate finding that the appellant could not avail itself of s 517 of the Companies Act 2016 to challenge the decision of the liquidator, because the sale had been approved by the High Court pursuant to the 26 August 2021 order. Accordingly, what was sought to be challenged was the order of court itself, which s 517 did not permit.

The contentions in this appeal

[8] The appellant raised two broad points in this appeal:

(a) it contended that the liquidator had failed to take reasonable steps to obtain the highest possible price for the Banting Resources shares, and hence the court ought to have set aside the sale; and

(b) s 517 applied in the circumstances of the case because the 26 August 2021 order merely constituted an administrative direction to the liquidator, and that the High Court's reliance on *Baddiadin* was in error.

[9] It will be apparent that the appellant must persuade this court on both points before it may succeed in this appeal.

Summary of this court's findings

[10] The following summarises our findings in this case:

(a) on the facts of the case, the appellant had not discharged the evidential burden to establish that the actions by the liquidator was in breach of his duty to act in the best interests of the creditors. Each alternative course of action open to the liquidator in selling the subject shares would have had its own cost and timing implications, and the balancing of the competing considerations must properly be a matter of the discretion of the liquidator. We have not been persuaded that that discretion has been improperly exercised in the circumstances of the present case;

(b) in order to establish its case that the liquidator had failed to discharge his duties, the appellant had sought to adduce an expert report prepared by

a corporate finance and investment advisory firm. However, we found this report to be of limited utility because:

(i) the firm in question was not a licensed real estate valuer, and hence was not competent to provide opinion evidence on the method of valuation employed by PPC International Sdn Bhd;

(ii) the appellant's expert misunderstood the nature of the discount applied by the corporate finance adviser engaged by the liquidator. The discount was to account for the lack of marketability of the Banting Resources shares, and not the lack of marketability of the mining lands held by it; and

(iii) while the submissions of counsel for the appellant proposed a valuation of RM88,216,799.58 for the Banting Resources shares, the appellant's expert's report itself *expressed no opinion* on the fair value of the subject shares.

(c) where the directions of the court are sought by a liquidator pursuant to s 487(3) of the Companies Act 2016, the decision of the court to grant those directions may be appealed against if the directions pronounced upon the rights of persons involved in or otherwise affected by the liquidation process with conclusiveness or finality. This was the case in the present instance;

(d) the High Court judge was thus correct to rule that he was functus officio once he had granted the 26 August 2021 order. The proper course of action for the appellant ought to have been to appeal against the 26 August 2021 order; and

(e) accordingly, the appellant could not avail itself of s 517 of the Companies Act 2016 because what was sought to be set aside was not merely an act or decision of the liquidator, but the 26 August 2021 order of the High Court.

[11] The preceding summary should be read as being subject to the analysis and reasoning set out in the paragraphs that follow.

MATERIAL FACTS

Banting Resources

[12] Lion Diversified directly held 87.96% of the equity interest in Banting Resources held by Lion Diversified, while the remaining shares were held by its wholly-owned subsidiary, LDH Trading Sdn Bhd. This meant that Lion Diversified indirectly held the entire equity interest in Banting Resources.

[13] Lion Diversified had been wound up by an order of court. Under s 484

of the Companies Act 2016, a statement of affairs of a wound up company must be submitted to the liquidator by (among others) a director, secretary or officer of the company, and thereafter filed by the liquidator in court and lodged by him with the Registrar of Companies.

[14] In the statement of affairs of Lion Diversified dated 11 September 2019, the estimated realisable value of the Banting Resources shares was set out as RM257,987,027.36. Based on the statement of affairs, the value of the shares in Banting Resources represented approximately 44% of the total realisable assets of Lion Diversified. It was thus clear that the value of the Banting Resources shares was significant in the context of the liquidation as a whole.

[15] The most significant assets in Banting Resources were its six parcels of mining land located in the Mukim of Tanjung Duabelas in Kuala Langat. Mining rights over these lands had been assigned to a company known as Lion Tin Sdn Bhd for a period of 15 years. At the material time, some 12 years remained on the assignment.

The tender exercise

[16] In order to ascertain whether the contention by the appellant that the liquidator has breached his duty has been made out, it will be necessary to examine the steps that had been taken by the liquidator in realising the shares of Banting Resources.

[17] The tender exercise was effected by way of advertisements made on 15 September 2020 in three national daily newspapers, in Malay, English and Chinese. Interested persons could obtain an information memorandum setting out further information on the assets being sold. According to the terms of the tender, bids must be received by 5pm on 6 October 2020. There were thus three weeks for interested purchasers to make a bid for the three companies and the two vehicles being sold.

[18] Two important events occurred during the tender period:

(a) the first creditors' meeting was held on 23 September 2020; and

(b) a firm of licensed corporate finance advisers issued its valuation report on Banting Resources to the liquidator.

[19] The first creditors' meeting had initially been scheduled for 29 March 2020, but due to the movement control orders that had been issued by the government in response to the Covid-19 pandemic, it was only held on 23 September 2020, having been rescheduled twice. The minutes of the meeting showed that the liquidator had informed the creditors of the public

tender exercise that was being conducted for three of the 19 subsidiary companies (see E32/358). Indeed, according to the affidavit in support affirmed in support of the appellant's notice of motion, the identity of Banting Resources as one of the three companies was made known to the creditors present at the meeting (see E31/98). There was no record of any queries or objections from the representatives of the appellant.

[20] On 5 October 2020, a day prior to the expiry of the tender period, Sierac Corporate Advisers Sdn Bhd ('Sierac') issued a valuation report to the liquidator, expressing its view that the fair value for 100% of the equity interest in Banting Resources as at 30 September 2020 was RM42.13m. Sierac had been engaged by the liquidator on 17 August 2020. The Sierac report explained that the valuation had been conducted on the basis of realisable net asset value ('RNAV') and that the value attributable to the mining lands held by Banting Resources were taken from a report by PPC International Sdn Bhd in its valuation report dated 29 September 2020. The market value for the mining lands was appraised at RM130m based on the comparison method. These lands were being held in the books of Banting Resources at a value of approximately RM195.6m, and hence there would be a revaluation deficit applied to account for the lower market value.

[21] Significantly, Sierac applied a 22% discount to account of the lack of marketability of the Banting Resources shares to arrive at its valuation of RM42.13m for the entire equity interest in Banting Resources. This meant that Lion Diversified's 87.96% share would be valued at RM37,057,548.

[22] By the time of the expiry of the public tender on 6 October 2020, only a single offer was received: the offer from Benapro of RM48m for 100% of the equity interest in Banting Resources. This offer was conditioned upon a waiver by Lion Diversified of debts owing by Banting Resources in the amount of RM5,593,655.34. The cash consideration payable to Lion Diversified after accounting for minority interests and waiver of inter-company debt would be RM36,627,144.66 (or approximately 98.84% of Sierac's valuation for Lion Diversified's holdings).

[23] As explained, Benapro is a related party to the substantial shareholder of Lion Diversified. Benapro's bid was accompanied by a statutory declaration in the form prescribed by the information memorandum, which disclosed the fact that Benapro is a related party to Tan Sri William Cheng.

The application to court under s 487(3)

[24] The general position in law is that, once a petition for the winding up of a company has been presented to court, no disposition of any property of the

company may be made without an order of court. This is provided in s 472 of the Companies Act 2016. As an exception to this general rule, a liquidator is permitted to make dispositions, provided such disposition is in exercise of the powers conferred under Part 1 of the Twelfth Schedule to the Act. Such dispositions are referred to as 'exempt dispositions', and include a sale by public tender.

[25] Thus, the liquidator would have had the power to effect the sale of the Banting Resources shares without any order of court. The liquidator has nonetheless, perhaps in an abundance of caution, made an application under s 487(3) for a direction from the court. Section 487 of the Companies Act 2016 reads as follows:

> 487 Exercise and control of liquidator's powers
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> (1) Subject to this Division, the liquidator shall, in the administration of the assets of the company and in the distribution among its creditors, have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall override any directions given by the committee of inspection in case of conflict.
>
> (2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than ten per centum in value of the creditors or contributories.
>
> (3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.
>
> (4) Subject to this Division, the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

[26] On 19 May 2021, the liquidator made the application under s 487(3) for (among others) the following directions:

(a) approval of the court for the disposition of Lion Diversified's equity interest in Banting Resources for a purchase consideration of RM42,220,800 pursuant to the public tender exercise;

(b) approval of the court for the waiver of inter-company debt; and

(c) approval of the court for the payment terms to be varied. Under the terms of the public tender as set out in the information memorandum dated 15 September 2020, the 90% balance purchase price would have been payable within 14 days from the date of fulfilment of the last of the conditions precedent to the sale and purchase of the subject shares. By its letter of 5 February 2021, Benapro proposed (among others) for payment

to be instead effected in three tranches.

[27] The application was approved in accordance with its terms by the High Court on 26 August 2021. The approval was documented in the form of an order of court.

WHETHER THERE HAD BEEN BREACH OF DUTY BY THE LIQUIDATOR

The applicable principles

[28] The principles upon which the court would interfere with the decision or action of a liquidator were not in material dispute between the parties, and it suffices for us to summarise them here.

[29] A court ought to be slow to interfere with the act or decision of liquidators in discharging their roles in company's liquidation particularly in matters involving sales of company's assets, which involve commercial considerations. However, such decisions of the liquidators are not beyond reproach. On the authority of *Koh Huat Kwan v Pegawai Penerima selaku pelikuidasi bagi Poh Mah Housing Development Sdn Bhd & Ors* [2015] 5 MLJ 323; [2015] 7 CLJ 16, a court will interfere with the exercise of the powers, acts or decisions of the liquidator if:

(a) the liquidator had acted fraudulently; or

(b) the liquidator was not bona fide in his conduct; or

(c) the conduct of the liquidator was so utterly unreasonable and absurd that no reasonable person would so act.

[30] A liquidator must take reasonable care to obtain the best price for the assets of the company in liquidation, as the circumstances of the case may permit. In the UK Supreme Court case of *MacDonald and another v Carnbroe Estates Ltd (Scotland)* [2019] UKSC 57, the court stated:

> [38] A liquidator is under a fiduciary duty to the company, and possibly its creditors as a class, to exercise the professional care and skill of an insolvency practitioner in realising the assets of an insolvent company (*Hague v Nam Tai Electronics Inc*; *Oldham v Kyrris*; see by analogy Lightman And Moss, *The Law of Administrators and Receivers of Companies*, para 12.042). The liquidator must take reasonable care in choosing the time at which to sell the property and must also take reasonable care to obtain the best price that the circumstances of the case, as he reasonably perceives them, permit (*Re Charnley Davies Ltd (No 2)*, per Millett J, pp 775, 776; *Silven Properties Ltd v Royal Bank Of Scotland PLC*, per Lightman J, para 25).

[31] It may be observed that the test is a subjective one: the circumstances of the case are those as perceived by the liquidator at the material time. A

The contention of breach

[32] There was no suggestion in this case that the liquidator had acted fraudulently or in a manner that was not bona fide. The contention by the appellant was that the liquidator had failed to take reasonable steps to obtain the highest possible price for the Banting Resources shares. We are thus concerned with the third of the three circumstances set out in the case of *Koh Huat Kwan v Pegawai Penerima selaku pelikuidasi bagi Poh Mah Housing Development Sdn Bhd & Ors* where a court may interfere with the decision of the liquidator. B C

[33] According to the appellant, the failure by the liquidator to properly perform his duties had resulted in the subject shares being sold at an undervalue to Benapro, and as evidence in support of this contention, the appellant adduced an expert report issued by a licensed corporate finance and investment advisory company, which reviewed the valuation made in the Sierac report. It was advanced for the appellant that that the equity value of the subject shares ought to have been approximately RM88.2m (see para 66 of the appellant's written submissions at E82/54). D E

[34] The appellant argued that there were two specific factors operating in the circumstances of the case which required the liquidator to take additional steps in order to discharge his duty to secure the best price for the subject shares. These were: F

(a) first, was the fact that the tender exercise was being conducted in the teeth of the storm that was the Covid-19 pandemic. The various measures that had been implemented by the authorities to stem the spread of the Covid-19 virus had stifled economic activity; and G

(b) second, the nature of the business of Banting Resources in holding tin mining reserves was a specialised one, and therefore only specialised mining operators would be in a position to properly evaluate the business. H

[35] The key thrust of the submission of counsel for the appellant was that — and I paraphrase in this regard — a reasonable liquidator would have taken into account these two factors operating at the material time and would have taken extra steps to ensure that he obtained the best possible price for the subject shares. The charge against the liquidator was set out in para 54 of the written submissions of Mr Yap Yeow Han, counsel for the appellant: I

> 54. In the present case, the Liquidator practically did nothing. Unlike the cases

outlined above, there was no efforts to inquire with specialised industry players nor professional property agents, especially given the nature of the assets, to secure more interested buyers. Advertisements in mass circulation newspapers would not have attracted the attention of potential buyers, due to the specialised nature of BRSB's holdings and businesses. After an obviously ineffective single round of advertisement in newspaper for the tender of the shares in the middle of the COVID-19 pandemic, the Liquidator promptly accepted the sole tender offer from Benapro, a company related to LDHB.

[36] In our considered view, it would be impermissible for the court to judge the actions of the liquidator with the benefit of hindsight. It would have been well-nigh impossible for the liquidator to know, circa September 2020, when the Covid-19 pandemic would come to an end, or indeed whether life would return to some semblance of normalcy at all. Could the liquidator have extended the tender period? Perhaps. Could he have published the tender more extensively? Indeed he could have. Would this have resulted in more bids being received? We do not know, because no specialised mining operator has come forward to state that they would have participated in the tender had it been brought to their specific attention, nor has there been any evidence to this effect.

[37] The evidential burden lies with the appellant to show that the actions by the liquidator was in breach of his duty to the creditors of Lion Diversified. On the facts of the case, the appellant has failed to discharge this burden, and we can find no error in the findings of the court below.

[38] It has also to be borne in mind that a public tender ought to conform to notions of fair play and equal treatment of the potential bidders. If bilateral approaches had been made to specific potential bidders, it would call into question the fairness of the tender process. Whatever information disclosed to those bidders must also be disclosed to all other interested bidders, in order to preserve the integrity of the public tender. All these steps would have had their attendant cost and timing implications, and it must not be forgotten that the liquidator is charged with the duty of undertaking the liquidation in a timely and orderly manner in the best interests of the creditors. The balancing of the competing considerations must properly be a matter of the discretion of the liquidator, and we are not convinced in this case that this discretion has been improperly exercised.

The AER expert report

[39] We now turn to the expert report prepared by Asia Equity Research Sdn Bhd ('AER'), which had been engaged by the appellant's solicitors. The scope of the AER report (see E44/2533) was expressed in the following terms:

On 28 December 2021, Messrs. Rahmat Lim & Partners had engaged Asia Equity Research Sdn Bhd ('AER') to act as an expert to review and evaluate the reasonableness on basis and assumptions of two reports and provide our comments where areas that needs further evaluation, namely as follows:

a) A business valuation report prepared by Sierac Corporate Advisers Sdn Bhd ('Sierac') dated 5 October 2020.

b) A property valuation report prepared by PPC International Sdn Bhd ('PPC') dated 29 September 2020 (as provided to AER on 8 January 2022).

[40] Having carefully examined the AER report in a fair amount of detail, we would make the following observations:

(a) the AER report sought to evaluate the reasonableness of the valuation by PPC International Sdn Bhd ('PPC International'), and concluded that, based on the information available to it, it was unable to express any opinion on the reasonableness of the valuation arrived at by PPC International. Now, AER is a licensed corporate finance and investment advisory firm. It is not a licensed real estate valuer. Even if AER had expressed an opinion on the correctness of the valuation by PPC International, we would have been constrained to conclude that that opinion would not have been admissible, as AER would not have been competent to express any opinion on the valuation of real property;

(b) the AER report criticised the application of the 22% discount by Sierac to account for lack of marketability. The relevant passage in the AER report stated as follows:

> As the Land is already stated at fair value and on assumption that the basis is reasonable of applying RM4.05 per square feet, further discounting for lack of marketability is not warranted, as the Land is based on open market value which subsequently had been adjusted for any issue of restrictions imposed on it. The discount of lack of marketability should not be applied in the RNAV method of valuation as the specific adjustments being made to the net assets had adjusted for issues contributing to the lack of marketability having considered specific factors affecting a land under valuation.

We are of the respectful view that this criticism is misplaced. The discount applied by Sierac to account for lack of marketability was not applied on the value of the land, but on the value of the *shares* in Banting Resources. Banting Resources is a private limited company, and for this reason there would not be a ready market for its shares. In our view, this fundamental misunderstanding of the Sierac report undermined the whole of the credibility of the AER report; and

(c) finally, while the submissions of counsel for the appellant proposes a valuation of RM88,216,799.58 for the Banting Resources shares, the AER report itself *expressed no opinion* on the fair value of the subject

shares. As explained, the AER Report concluded that it was unable to express any opinion on the reasonableness of the land valuation arrived at by PPC International, and criticised the application of the 22% discount by Sierac. But the AER report did not itself proffer any view on what would have been the fair value for the Banting Resources shares.

We can therefore only conclude that there was only one valuation that was properly before the court, and that the valuation of RM88,216,799.58 proposed by counsel for the appellant was no more than a submission from the bar.

[41] There was thus no basis for the court to have concluded that the sale to Benapro was at an undervalue. We would agree with the conclusion of the court below, that the value of the shares to be sold was that which was obtained in the tender exercise.

[42] For the reasons explained above, we are of the view that the contentions by the appellant that there has been breaches of duty on the part of the liquidator have not been made out.

[43] Our views thus far expressed would have been sufficient to dispose of the entire appeal. Nonetheless, for the sake of completeness, we address in the following paragraphs the submissions of counsel regarding the competency of the appellant's application to the High Court.

THE APPLICABILITY OF S 517

[44] The appellant's notice of motion to the High Court was expressed to have been made pursuant to s 510 and/or s 517 of the Companies Act 2016.

[45] As previously explained, the learned High Court judge was of the view he was not clothed with the jurisdiction to revisit the order that he had granted on 26 August 2021 approving the sale to Benapro. The court below ruled that it was functus officio, and that any attempt to set aside its prior order must be made in separate proceedings commenced for that purpose and must be premised upon an allegation that the order had been irregularly obtained due to illegality, breach of the rules of natural justice or lack of jurisdiction, in accordance with the settled principles established in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. The High Court also ruled that the appellant could not avail itself of s 517 of the Companies Act 2016, as this section did not permit any challenge against an order of court.

[46] Sections 510 and 517 provide as follows:

510 Control of Court over liquidators

(1) The Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the Court or if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard to the conduct, the Court shall inquire into the matter and take such action as the Court thinks fit.

(2) The Registrar or the Official Receiver may report to the Court any matter which in the opinion of the Registrar or the Official Receiver is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss which the property of the company has sustained and make such other order as the Court thinks fit.

(3) The Court may at any time require any liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books and vouchers of the liquidator.

...

517 Appeal against decision of liquidator

Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[47] Learned counsel for the appellant referred the court to the case of *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 2 CLJ 501 as authority for the principle that a direction issued by the court pursuant to an application made under s 487(3) of the Companies Act 2016 did not amount to an order of the court but was merely administrative in nature, and hence was not a matter against which an appeal may be mounted. It followed therefore that, if the determination or direction of the court was not appealable, the only way in which an aggrieved party could seek redress was to go back to the High Court, which was precisely what the appellant had done in the circumstances of this case. Put another way, based on the authority of that case, the appellant could not have appealed against the 26 August 2021 order, because on its proper construction this order was not an order at all, but merely a direction arising from an administrative proceeding.

[48] *Ooi Woon Chee v Dato' See Teow Chuan* was a case decided under the predecessor Companies Act 1965, s 237(3) of which was in pari materia with the present s 487(3). The Federal Court in that case stated as follows:

[52] It is also our considered view that the Court of Appeal erred in failing to find that the directions given by the learned judicial commissioner under s 237(3) of the Act were in the nature of advice and is accordingly not a judgment or order within the scope of s 67(1) of the Courts of Judicature Act 1964 ('the CJA 1964') and are thereby non-appealable. An appeal to the Court of Appeal only lies from a

judgment or order within s 67(1) of the CJA 1964 which provides:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter ...

[53] We are of the view a direction or advice given under s 237(3) of the Act is not a judgment or order. In *Re Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq)* (1989) 7 ACLC 1270, the court in considering the nature of application for directions under s 379(3) of the Companies (Queensland) Code which is similar to our s 237(3) of the Act held at p 1273 that a direction given under similar provisions is not a 'judgment' or 'order'. The court followed *Re Blackcbird Pies (Management) Pty Ltd (No 2)* [1970] Qd R 33 wherein it was held:

> That subsection [s 237(3)] does not, in my opinion enable the Court to make binding orders on persons in the nature of judgments. The directions which a Court may give on an application under it are more like the directions or advice which may be given under section 45 of the Trustees and the Executors Acts. Such directions are not in my opinion, subject to appeal. (*Re Tooth's Trusts* [1877] 5 QSCR 10). I have set out these views on section 237(3) because it was contended that the decision of W.B. Campbell J created an estoppels between the parties. But there was no judgment and no order. In my opinion there was no estoppels. Nor was there any right of appeal.

[54] The rationale or the purpose of s 237(3) of the Act is to enable a liquidator both to obtain advice and to protect his position as to personal liability in the administration of the winding up. This reasoning has been followed in several Australian decisions. In *Re Security Provident Fund Limited (in liq)*; *Rodger v Gourlay* (1984) 2 ACLC 594 at p 595 the Australian Supreme Court ruled that:

> The major matter is that the question asked in the summons (or at least questions 1 and 2) are outside the scope of liquidators' summons for directions. It is clear, upon authority, that subsec 379(3) does not enable the Court to make binding orders in the nature of judgment ...
>
> The function of a liquidators' summons for directions is to give him advice as to his proper course of action in the liquidation; ...

In *Re JW Murphy & PC Allen* (1996) 19 ACSR 569, the Supreme Court of New South Wales held at p 570:

> an application for directions under s 379(3) of the Companies Code [or s 479(3) of the Corporation Law] is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding up.

[55] As encl 485 direction is only an administrative proceeding by way of advice, any direction given is not a judgment or order and therefore does not fall within s 67 of the CJA 1964. It is our judgment therefore that the directions given by the learned judicial commissioner in encl 485 are non-appealable.

[49] The decision of the Federal Court in *Ooi Woon Chee v Dato' See Teow Chuan* has however been clarified in two subsequent decisions: the Court of

Appeal case in *Equiticorp Holdings Ltd (in statutory management) v Mak Kum Choon & Ors and another appeal* [2020] 6 MLJ 1; [2019] 5 AMR 817; [2020] 2 MLRA 114 and the Federal Court decision in *Tan Kim Chuan v Tan Kim Tian & Ors and another appeal* [2022] 6 MLJ 888; [2022] 8 AMR 1; [2022] 10 CLJ 503. The principles settled by these two cases may be summarised in the following manner:

(a) whether or not the directions sought from, and given by, the court pursuant to s 487(3) are appealable depends on the true nature of the directions sought: whether the directions constituted advice of an administrative nature from the court to the liquidator, or whether the directions constituted a final order affecting the substantive rights of parties to the proceeding or of other persons who may be affected by the order;

(b) where the directions are merely of an administrative nature and do not give rise to conclusiveness or finality as to the rights of persons involved in the liquidation process, then those directions do not give rise to a right of appeal, following the decision in *Ooi Woon Chee v Dato' See Teow Chuan*;

(c) where however, the directions pronounced upon the rights of persons involved in or otherwise affected by the liquidation process with conclusiveness or finality, then an appeal may properly be mounted upon the decision granting those directions; and

(d) in every case, the proper nature and character of the directions sought must be determined from the facts and circumstances of each case.

[50] The directions sought in the form of summons by the liquidator dated 19 May 2021 were to effect the sale of the Banting Resources shares held by Lion Diversified upon the terms proposed by Benapro. The directions that were given indisputably affected the rights of creditors Lion Diversified as well as the rights and obligations of Benapro, and did so with conclusiveness and finality. Further, the words of the 26 August 2021 order were peremptory in nature, and not merely in the nature of advice. It is thus abundantly clear to us that, on their proper construction, the directions contained in the 26 August 2021 order constituted a judgment of the High Court against which an appeal could validly be mounted.

[51] It followed therefore that the learned High Court judge was entirely correct to rule that he was functus officio once he had granted the 26 August 2021 order. The proper course of action for the appellant ought to have been to appeal against the 26 August 2021 order.

[52] It further followed that the appellant could not avail itself of s 517

because, as correctly pointed out by the court below, what was sought to be set aside was not merely an act or decision of the liquidator, but the 26 August 2021 order of the High Court. As explained, the proper course would have been for the appellant to appeal against the decision of Nadzarin J.

[53] We hasten to add that, had an appeal been properly pursued, we would have nonetheless dismissed the appeal as the facts of the case disclosed no breach of duty on the part of the liquidator, as explained at paras [28] to [43], ante.

[54] For the reasons explained, we dismiss the appeal with costs of RM50,000 to the first respondent and RM30,000 to the second respondent, such costs to be subject to an allocatur.

Appeal dismissed.

Reported by K Selvaraju